Chang et al v. Virgin Mobile USA LLC et al Doc. 60

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SUSAN CHANG, AS NEXT FRIEND OF ALISON CHANG, A MINOR, AND JUSTIN HO-WEE WONG,	§	
PLAINTIFFS,	§	CA No. 3:07-cv-1767
V.	§	
VIRGIN MOBILE PTY LTD.,	§	
DEFENDANT.	§	

APPENDIX IN SUPPORT OF
DEFENDANT VIRGIN MOBILE (AUSTRALIA) PTY LTD.'S OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE SUR-REPLY TO DEFENDANT'S REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Description	Bates
Declaration of Lisa H. Meyerhoff	APP 1 – 2
Excerpts of Flickr.com discussion forum entitled "Virgin Mobile advertising campaign using Flickr photos" by an individual identifying himself/herself as sesh00 and A.C's brother, Damon Chang	APP 3-8
Defendant Virgin Mobile Pty Limited's First Supplemental Objections and Answers to Plaintiffs' Original (First) Interrogatory Nos. 2, 18, and 19	APP 9-15
Excerpts from the deposition of David Cain that was taken on April 23, 2008	APP 16-37

Dockets.Justia.com

Respectfully submitted,

BAKER & McKENZIE LLP

/s/ Lisa H. Meyerhoff

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VIRGIN MOBILE PTY, LTD.

CERTIFICATE OF SERVICE

I hereby certify that, on the 14th day of August 2008, I electronically filed the foregoing "Appendix in Support of Defendant Virgin Mobile (Australia) Pty Ltd.'s Opposition to Plaintiffs' Motion for Leave to File Sur-Reply to Defendant's Reply to Plaintiffs' Opposition to Defendant's Motion to Dismiss" with the Clerk of Court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the Court. The electronic case filing system sent a "Notice of Electronic Filing" to the following attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means:

Bryant A. Fitts
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/s/ Lisa H. Meyerhoff

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SUSAN CHANG, AS NEXT FRIEND OF ALISON CHANG, A MINOR, AND JUSTIN HO-WEE WONG, Plaintiffs, V. VIRGIN MOBILE PTY, LTD., Defendant.	§ § § § § § § § § § §	C.A. No. 3-07-CV-01767-ECF

DECLARATION OF LISA H. MEYERHOFF IN SUPPORT OF DEFENDANT VIRGIN MOBILE PTY, LTD.'S OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE SUR-REPLY TO DEFENDANT'S REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

I, Lisa H. Meyerhoff, declare and state as follows:

1. My name is Lisa H. Meyerhoff. I am a partner with the firm of Baker & McKenzie LLP. Our firm represents Defendant Virgin Mobile Pty, Ltd. in the above-captioned suit. This Declaration is submitted in support of Defendant Virgin Mobile Pty, Ltd.'s Opposition to Plaintiffs' Motion for Leave to File Sur-Reply to Defendant's Reply to Plaintiffs' Opposition to Defendant's Motion to Dismiss.

2. I am over the age of twenty-one (21) and am competent to make this Declaration. I have personal knowledge of the facts stated herein.

3. Attached to Defendant's Appendix is a true and correct copy of excerpts from a Flickr.com discussion blog entry entitled "Virgin Mobile advertising campaign using Flickr photos" by an individual identifying himself/herself as sesh00 and A.C's brother, Damon Chang. APP 3-8.

4. Attached to Defendant's Appendix is a true and correct copy of excerpts from Defendant Virgin Mobile Pty Limited's First Supplemental Objections and Answers to Plaintiffs' Original (First) Interrogatory Nos. 2, 18, and 19. APP 9-15.

5. Attached to Defendant's Appendix is a true and correct copy of excerpts from the deposition of David Cain that was taken on April 23, 2008. APP 16-37.

I declare under penalty of perjury that the foregoing is true and correct.

Date: August 14, 2008

Lisa H. Meyerhoff

flickr

You aren't signed in Sign In Help

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Search this group's discussions Search

FlickrCentral / Discuss

Current Discussion

Look through the photostream of the person above you and choose your favourite
Latest: 4 minutes ago

Birmingham skyline photograph mix up
Latest: 7 minutes ago

"Copyright Lasts Forever" Claims Wal-Mart Employee
Latest: 18 minutes ago

Tripods on a plane...
Latest: 20 minutes ago

[closed] So how does "interestingness" work ???
Latest: 2 hours ago

Strange Cameras You Don't See Every Day
Latest: 2 hours ago

Happy lefties day!!
Latest: 2 hours ago

How-To: Stop the RIAA/MPAA from sniffing your bittorrent traffic
Latest: 3 hours ago

Photojournalism
Latest: 5 hours ago

Virgin Mobile advertising campaign using Flickr photos

sesh00 says:

OK - So from here I guess it goes in the direction of wondering what should be done about this?

I just found a blog post that details the specifics of the advertising campaign.

> The Virgin Mobile 'Are You With Us' campaign was developed at Host, with creative work provided by The Glue Society (James Dive, James Harvey, Jonathan Kneebone). Virgin Mobile Australia marketing staff included Rich Field and Dave Cain.

Should I get the person in the photo (who I don't actually know personally) to contact

the advertising agency? Or would it be best to bring it to their attention ourselves?
Or.... Should I let the Flickr legal department know and see what they have to say?

I'm getting the feeling that it would be best to let Flickr handle the situation (if they are interested in doing that) - I'm just not sure who to contact about it!
Originally posted 14 months ago. (permalink)
sesh00 edited this topic 14 months ago.

FlickrCentral / Discuss

Current Discussion

Look through the photostream of the person above you and choose your favourite
Latest: 7 minutes ago

Birmingham skyline photograph mix up
Latest: 10 minutes ago

"Copyright Lasts Forever" Claims Wal-Mart Employee
Latest: 21 minutes ago

Tripods on a plane...
Latest: 23 minutes ago

[closed] So how does "interestingness" work ???
Latest: 2 hours ago

Strange Cameras You Don't See Every Day
Latest: 2 hours ago

Happy lefties day!!
Latest: 2 hours ago

How-To: Stop the RIAA/MPAA from sniffing your bittorrent traffic
Latest: 3 hours ago

Photojournalism
Latest: 5 hours ago

Virgin Mobile advertising campaign using Flickr photos

teacherjamesdotcom says:

Hi, I just wanted to update people on the situation with my sister's photograph.

We have retained legal counsel in the US and have sent Virgin Mobile US and Virgin

Mobile Australia a formal demand letter requesting compensation for the use of her image in these ads. I feel that it should be fair that they compensate her since they used her image for commercial purposes.

Here's my email address in case any other photographers or models from the ads want more information:

damon@teacherjames.com

Any legal queries can be forwarded to:

Ryan Zehl
c/o Fitts Zehl LLP (Houston, Texas)

Thanks, I'll try keep everyone updated as we go.

Damon
Posted 12 months ago. (permalink)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SUSAN CHANG, AS NEXT FRIEND OF ALISON CHANG, A MINOR, AND JUSTIN HO-WEE WONG,	§	
Plaintiffs,	§	CA No. 3:07-cv-1767
V.	§	
VIRGIN MOBILE PTY LIMITED,	§	
Defendant.	§	

DEFENDANT VIRGIN MOBILE PTY LIMITED'S FIRST SUPPLEMENTAL OBJECTIONS AND ANSWERS TO PLAINTIFFS' ORIGINAL (FIRST) INTERROGATORIES

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, Defendant Virgin Mobile (Australia) Pty Limited, incorrectly sued as Virgin Mobile Pty Limited, hereinafter ("Defendant" or "Virgin Australia"), serves the following First Supplemental Objections and Answers to Plaintiffs' Original (First) Interrogatories.

GENERAL OBJECTIONS

1. Virgin Australia objects to the Interrogatories to the extent that they seek materials or information beyond the scope of jurisdictional discovery.

2. Virgin Australia objects to the Interrogatories to the extent that they are premature pending a ruling on the Defendant's Motion to Dismiss.

3. Virgin Australia objects to the Interrogatories to the extent that they seek materials or information protected by the attorney-client privilege, the attorney work product doctrine and/or any other applicable privileges. To the extent that the Interrogatories can be construed to include such privileged matters, Virgin Australia will provide only non-privileged

INTERROGATORIES

INTERROGATORY NO. 2:

Identify the name and employer of each person and/or entity who participated in the creation, design or implementation of the "Are you with us or what" campaign, including within your answer a brief description of the job responsibilities of each person or entity identified.

ANSWER:

Virgin Australia objects to this Interrogatory as irrelevant, as not reasonably calculated to lead to the discovery of admissible evidence, and as overly broad to the extent that it is not within the scope of jurisdictional discovery. Virgin Australia further objects to this Interrogatory to the extent that it is premature pending a ruling on the Defendant's Motion to Dismiss.

SUPPLEMENTAL ANSWER:

Virgin Mobile (Australia) Pty Limited contracted with the Australian marketing company Host, to design and deliver an advertising campaign in support of Virgin Australia's 'Free Text' promotion which was to be advertised exclusively in Australia. Host, in turn, contracted with an Australian creative agency, The Glue Society, to work with Host to design and develop different marketing concepts that would include an image with a statement and/or opinion to advertise the 'Free Text' promotion shown in select cities in Australia. Dave Cain is Virgin Australia's Brand Communications Manager who was part of the team which approved and selected from Host/The Glue Society's marketing concept(s) for use in Virgin Australia's 'Free Text' promotion. The Host employees who worked on the design and development of Virgin Australia's 'Free Text' promotion include Vicki Monroe, Matthew Coony and Anthony Freedman. The Glue Society's employees who worked with Host for the design and development of Virgin Australia's 'Free Text' promotion include James Dive, James Harvey and Jonathon Kneebone.

INTERROGATORY NO. 18:

For the photographs that were obtained from Flickr and used in the "Are you with us or what" campaign, please:

(a) Identify the owner and location of the computer where the photos were downloaded and/or saved;

(b) The name and employer of each person who was in anyway involved with the selection and/or approval of the photos used in the campaign;

(c) The location of the computer, file, and/or hard drive where the photos are currently located; and

(d) A description of all communications and/or contracts used in connection with obtaining rights to use the images in the campaign.

ANSWER:

Virgin Australia objects to this Interrogatory as irrelevant, as not reasonably calculated to lead to the discovery of admissible evidence, and as overly broad to the extent that it is not within the scope of jurisdictional discovery. Virgin Australia further objects to this Interrogatory to the extent that it is premature pending a ruling on the Defendant's Motion to Dismiss. Virgin Australia further objects to this Interrogatory to the extent that it seeks information from persons or entities that are not parties to the lawsuit nor subject to Virgin Australia's control, either direct or indirect. Virgin Australia further objects to the term "all communications and/or contracts" as overly broad. Subject to the foregoing general and specific objections, Defendant answers as follows:

Any downloading or saving of the above-mentioned photographs would have occurred outside of the United States, namely in Australia, by an entity located outside of the United States, namely in Australia. The current location of the above-mentioned photographs would be outside of the United States, namely in Australia.

SUPPLEMENTAL ANSWER:

(a) Host and/or The Glue Society, both located in Sydney, Australia, would be knowledgeable of the owner and/or user of the computer for any saved and/or dowloaded image(s) utilized for the marketing campaign in question.

(b) The Glue Society- James Dive, James Harvey and Jonathon Kneebone.
Host- Vicki Monroe, Matthew Coony and Anthony Freedman

(c) Host and/or The Glue Society of Sydney, Australia, would have knowledge of where any image utilized for the marketing campaign in question would be currently located.

(d) There was an oral contract between Virgin Australia and the Australian marketing company Host, to create, design and deliver an advertising campaign in support of Virgin Australia's new free text messaging program advertised exclusively in Australia.

INTERROGATORY NO. 19:

Please identify (1) the date you downloaded Alison Chang's photo from Flickr; (2) the date the picture was first displayed in an advertisement connected with the campaign; (3) the last day the photo appeared in an advertisement connected with the campaign; (4) the Uniform

Resource Locater of the website where the photo was downloaded from; (5) the owner and location of the computer and/or hard drive where the picture was downloaded to; and (6) the name and employer of each person that participated in selecting and/or approving the photo for use in the campaign.

ANSWER:

Virgin Australia objects to this Interrogatory as irrelevant, as not reasonably calculated to lead to the discovery of admissible evidence, and as overly broad to the extent that it is not within the scope of jurisdictional discovery. Virgin Australia further objects to this Interrogatory to the extent that it is premature pending a ruling on the Defendant's Motion to Dismiss. Subject to the foregoing general and specific objections, Defendant answers as follows:

Any downloading or saving of the above-mentioned images and would have occurred outside of the United States, namely in Australia, by an entity outside of the United States, namely in Australia. Any employee for Virgin Australia who participated in selecting and/or approving the image for use in the campaign would be located outside of the United States, namely in Australia.

SUPPLEMENTAL ANSWER:

(1) Virgin Australia never downloaded any image of Alison Chang from Flickr. Either Host and/or The Glue Society, both located in Sydney, Australia, would be knowledgeable of the date when they obtained any image utilized for the marketing campaign in question.

(2) This answer will be supplemented upon receipt of the date or approximate date.

(3) This answer will be supplemented upon receipt of the date or approximate date.

(4) Host and/or The Glue Society, both located in Sydney, Australia, would be knowledgeable of the URL, if any, where any image utilized for the marketing campaign in question was obtained.

(5) See the Answer to 18(a).

(6) See the Answer to 18(b).

Respectfully submitted,

BAKER & McKENZIE LLP

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ATTORNEYS FOR DEFENDANT
VIRGIN MOBILE (AUSTRALIA) PTY,
LIMITED

CERTIFICATE OF SERVICE

I hereby certify that, on the 18th day of April 2008, a true and correct copy of "Defendant Virgin Mobile Pty Limited's First Supplemental Objections and Answers to Plaintiffs' Original (First) Interrogatories" has been served by U.S. Mail, First Class, postage prepaid and e-mail, on Plaintiffs' counsel as follows:

Bryant A. Fitts
Ryan H. Zehl
Fitts Zehl LLP
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Houston, Texas 77056
Email: rzehl@fittszehl.com

HOUDMS/228023.1

COPY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISON

SUSAN CHANG, as Next Friend)
of Alison Chang, a minor, And)
Justin Ho-Wee Wong)
)
Plaintiffs) Cause No. 3:07-CV-01767
)
v.)
)
Virgin Mobile Pty Ltd)
)
Defendant)
)
)

Pursuant to Rule 30(b)(6),
Federal Rules of Civil Procedure

VIDEOTAPED VIDEOCONFERENCE
DEPOSITION OF DAVID CAIN

Taken at: Baker & McKenzie
Level 27, AMP Centre
50 Bridge Street
Sydney, NSW, 2000
Australia

On: Wednesday, April 23, 2008 at 10.28am

Reporter: Judith White, JP 184396

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Videographer:
Mr Wayne Matthews
National Court Reporters, Inc

WITNESS INDEX

Witness	Examined by	Page
David Cain	Mr Zehl	5

EXHIBIT INDEX

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Exhibit 1	Print-Out from Flickr web site (8 pages)	18
Exhibit 2	Notice of Deposition (3 pages)	52

THE VIDEOGRAPHER: This is videotape number 1 in the deposition of David Cain in the matter of Susan Chang, as Next Friend of Alison Chang, a minor, And Justin Ho-Wee Wong v Virgin Mobile Pty Limited in the United States District Court, Northern District of Texas, Dallas Division. The case number is cause no. 3:07-CV-01767. Today's date is the 23rd of April 2008 and the time on the video monitor is 10.28am.

The videographer today is Wayne Matthews from National Court Reporters of Cleveland, Ohio, and this video deposition is taking place at level 27, 50 Bridge Street, Sydney, Australia.

Would counsel please identify yourselves and state whom you represent.

MR FITTS: My name is Bryant Fitts from the law firm of Fitts & Zehl. I'm here for the plaintiffs.

MR ZEHL: My name is Ryan Zehl and I am also with Fitts Zehl. I represent the plaintiffs.

MR HAWKINS: Myall Hawkins from Baker & McKenzie representing the defendant.

THE VIDEOGRAPHER: In Sydney.

MR STEWART: Andrew Stewart, Baker & McKenzie for the defendant.

MR BOURGET: Marcus Bourget. Corporate counsel Virgin Mobile Australia.

THE VIDEOGRAPHER: The court reporter today is Judith White from the firm of National Court Reporters of Cleveland, Ohio. Would the Justice of the Peace, Judith White, please swear in the witness.

DAVID CAIN,

having been duly affirmed, testified as follows:

THE VIDEOGRAPHER: Proceed, gentlemen.

BY MR ZEHL:

Q. Okay. Mr Cain, my name is Ryan Zehl and, as I stated earlier, I represent the plaintiffs in this case. Do you understand - Mr Cain, do you understand why we're here today, that we're involved in a lawsuit against Virgin Mobile?

A. Yes, I do.

Q. Okay. Mr Cain, have you ever been in a deposition before?

A. No, I haven't.

Q. Okay. I - I'm going to just give you a couple of general rules, just to make this easier. As you'll notice, there is some delay between my questions - well, there's a delay after my questions. If you wouldn't mind just waiting a couple of seconds before you answer so that there's no communication problems.

A. Yes, okay.

Q. Okay. And if you don't understand something

Global Loyalty, did you then join Virgin Mobile?
A. That's correct.
Q. Okay. In what year did you join Virgin Mobile?
A. I began - started work as a contractor in 2003 and became full time that year as well.
Q. Okay. Can you tell me what you did as a contractor?
A. I was looking after the retention program, so - yep.
Q. What - what is the retention program?
A. So customers who are with Virgin Mobile, trying to get them to stay with Virgin Mobile.
Q. Okay. How many positions have you held since you worked as a contractor?
A. Two positions.
Q. Okay. Can you tell me what those positions are and - and describe your job responsibilities, please?
A. Well, I was loyalty manager to start with, which was the title I was given when I moved to full time, looking after the retention program still. Then I moved to brand and communications manager, where I look after essentially big advertising campaigns.
Q. And are you now the brand communications manager?
A. Yes.

Q. How long have you served in this role as brand communication manager?
A. Well, since the end of 2003.
Q. Okay. So from 2003 to the present day?
A. That's correct.
Q. You said that you're responsible for big advertising campaigns - is that right - as the brand communications manager?
A. That's correct.
Q. Approximately how many campaigns would you say you've been responsible for since you started in your role as brand communications manager?
A. I'd say between - between six and eight.
Q. Between six and eight?
A. Mmm-hmm.
Q. What was your most recent campaign?
A. Most recent campaign was the launch of Virgin Broadband last August.
Q. Okay. When did you launch the "Are you with us or what?" campaign?
A. In May of last year.
Q. Okay. And - and approximately how long did that campaign last - last?
A. I think it was roughly middle of May to the end of July.

Q. Okay. So a little over two months?
A. Yep.
Q. Mr Cain, do you - are you paid by Virgin Mobile?
A. Yes.
Q. Do you have any employment contract with Virgin Mobile?
A. Yes, I believe so.
Q. Do you - when - when you are paid by Virgin Mobile, do you receive a cheque or is the money just deposited in your account electronically?
A. Bank deposit monthly.
Q. And do you know who deposits those funds in your account, which company?
A. Virgin Mobile.
Q. Okay. Who's the - do you know who the president is or CEO of Virgin Mobile?
A. Yes.
Q. Who is that?
A. His name is Matt Davey.
Q. And is he the CEO or the president or both?
A. CEO.
Q. Okay. Do you know who any of the directors or officers of the company are?
A. Yes.

Q. Can you identify those officers or directors that you are aware of, please?
A. The sales director's name is Geoff Hester, the marketing director's name is John Bradshaw, the customer service director's name is Rob Tihanyi, the finance director's name is Barbara - and her last name escapes me at this second - at this second, and there's an operations director, I think his name is Keir. I don't know his last name at this time either - Preedy.
Q. Okay. Thanks, Mr Cain. Do you report to the marketing director?
A. Yes.
Q. Would - would it be fair to say that the marketing director is your boss?
A. Yes.
Q. And over - over your five or so years at the company in the role that you're currently in, you said you have been responsible for about six or eight advertising campaigns; that's right? Correct?
A. Yes.
Q. Who is responsible for designing the campaigns?
A. Our advertising vendors.
Q. Okay. Your advertising vendors?
A. Mmm-hmm.
Q. Who - and who are your advertising vendors?

A. Primarily Host.
Q. Anyone else?
A. Not of any consequence, no.
Q. Not of any consequence. Have you worked with any other advertising vendors besides Host?
A. Yes.
Q. Can you identify those for me?
A. There's a company called Faster Louder which helped us advertise a music event last year.
Q. Okay. Is that the only other one?
A. There's another company called Modular, and they also advertised that - helped us advertise that same music event the year before.
Q. What about with your TV and radio campaigns? Which vendors do you work with in conjunction with those types of campaigns?
A. Host is in charge of all of our television campaigns.
Q. Have they been in charge of your television campaigns since you joined the company --
A. Yes.
Q. -- or - or began acting as the brand director?
A. Yes.
Q. Okay. Do you know approximately how long Virgin Mobile has worked - worked with Host?

A. Yes. Since launch.
Q. Since launch of what?
A. Sorry, the launch of --
Q. The company?
A. Yes, seven years. Over seven years.
Q. Okay. Okay. How does Virgin Mobile compensate Host? Do they compensate Host for their advertising services?
A. Yes.
Q. And do they do - do they do so by hour or by project or per year?
A. It's a combination of by hour and by project.
Q. Okay. I'm going to ask you some questions now about the "Are you with us or what?" campaign. Are you familiar with that campaign?
A. Yes.
Q. Were you responsible for that campaign?
MR HAWKINS: Object. Form.
THE WITNESS: Yeah, what do you mean by "responsible"?
BY MR ZEHL:
Q. Who - who at Virgin Mobile was responsible for that campaign?
MR HAWKINS: Same objection.
THE WITNESS: Again, there's - a lot of people are

responsible for the campaign.

BY MR ZEHL:

Q. Okay. Who at Virgin Mobile came up with the idea for the campaign?

A. No-one at Virgin Mobile came up with the idea.

Q. Okay. Who at Virgin Mobile decided to promote Virgin Mobile products in conjunction with the campaign?

A. The brand department.

Q. And are you in the brand department?

A. Yes.

Q. Are you the head of the brand department?

A. At this present time, yes.

Q. At the time of the campaign, were you the head of the brand department?

A. No, I wasn't.

Q. Okay. Who was the head of the brand department at that time?

A. Richard Field.

Q. Where is Richard Field now?

A. He lives in South Africa.

Q. Does he no longer work for Virgin Mobile?

A. No, he doesn't work for Virgin Mobile.

Q. Were you working in the brand department during the "Are you with us or what?" campaign?

A. Yes, I was.

Q. What was your role at that time?

A. To oversee the execution of advertising campaigns.

Q. Okay. Can you tell me why the former director of the brand department has left?

A. I don't know.

Q. Do you know when he left?

A. Yes.

Q. When was that?

A. December 28 last year.

Q. Of 2007?

A. Yes, that's correct.

Q. Okay. Were there any campaigns between the "Are you with us or what?" campaign and the time that the former director left the company?

A. Yes.

Q. Which campaigns were those?

A. The Virgin Broadband launch.

Q. Okay. Is that the only one?

A. Yes. There were - yes.

Q. Okay. Can you explain to me what your involvement was with the "Are you with us or what?" campaign?

A. My involvement was to work with outside - our outside advertising vendor, Host, in order to get an

advertising campaign to market.
Q. To market what?
A. To market free text Virgin to Virgin.
Q. Okay. So who approached Host about promoting free text messages?
A. Myself and Rich Field had a meeting with Host.
Q. Okay. And can you tell me, based on your observations and presence at that meeting, what was discussed during the meeting?
A. We told them that we had a new product which was we were offering free text to all Virgin Mobile customers when they text - send a text message to another Virgin Mobile customer. So we asked them to come up with an advertising campaign to sell that product.
Q. Okay. Can you - I'm sorry, I didn't write it down. What was the name of the former director again?
A. He - his title was brand general manager, I think you're referring to. His name was Richard Field.
Q. Okay. Thank you. And during this meeting, what instructions did you give to Host to help them assist Virgin Mobile with this campaign?
A. We asked to come - for them to come up with a range of concepts, advertising concepts, which would help people understand that if they were with Virgin Mobile that they could send another text message - send a text message to another Virgin Mobile customer for free.
Q. Okay. Did you instruct - did you give them any specific guidelines on what kind of concepts to come up with or what slogans to use, what kind of images to use?
A. No. The only - the only instruction - the only instruction was that it had to be within the "Are you with us or what?" guidelines.
Q. Okay. And what were the "Are you with us or what?" guidelines?
A. All it is is that it has to pose an opinion and then make it obvious which - of which part of that - of - of where - of where Virgin Mobile stood on that opinion.
Q. Okay. And it would be people that were projecting this opinion; is that right?
A. That wasn't in the brief, no.
Q. So animals could express opinions?
A. I can't - I don't - can't answer that. I - I don't know.
Q. So is it - was it not implicit to your marketing campaign that a person project the opinion?
MR HAWKINS: Object. Form.
THE WITNESS: It wasn't explicit.
BY MR ZEHL:
Q. Implicit?
A. It wasn't implicit.

MR HAWKINS: Same objection.
BY MR ZEHL:
Q. Okay. When you asked them to design these concepts, would they then come back to you or somebody within the brand marketing department with their ideas?
A. That's correct.
Q. And approximately how many times would you say they came back to you with different ideas before you selected the images and text that would be used in the "Are you with us or what?" campaign.
MR HAWKINS: Object. Form. Let me check, when you - when you're saying "ideas", are you talking about a concept or are you talking about a finished product?
MR ZEHL: A concept.
MR HAWKINS: Okay.
BY MR ZEHL:
Q. How many concepts - I'll repeat. How many concepts did they offer to you before you launched the campaign?
A. There was three concepts originally.
Q. Okay. And did you eventually choose one of those concepts?
A. Yes.
Q. Who was it that made the decision to choose the concept - was it you or was it Richard?
A. Rich and I both decided, in consultation.
Q. Okay. Can you - can you briefly describe what those three concepts that they recommended to you entailed?
A. I can tell you the first concept involved a number of images of people and parts of people, people's hands, objects, glasses of beer or - and they had text over the top of them in the form of an opinion and a logo. It was a series of - of print advertisements that all followed that same sort of structure. At - at this time I can't remember what the other two concepts were.
Q. Okay. Was the concept that you just described to me the concept that was ultimately chosen --
A. Yes.
Q. -- for the "Are you with us or what?" campaign?
A. Yes, that's correct.
Q. Okay. Did you have - okay. Did you have a - how well - I'll strike what I said. How well did you know Richard?
A. Yeah, he was a friend and a work colleague. Yeah, I knew him quite well.
Q. Did you know him before you joined Virgin Mobile?
A. No.
Q. Okay. Do you know where Richard was from?

A. Where he worked or where he was born?
Q. Where - where he was - where he was born, where he grew up?
A. South Africa.
Q. Okay. And you tell me that you were friends from working together at Virgin Mobile; is that correct?
A. Yes.
Q. And before he left, he never indicated to you why he was leaving; is that correct?
A. He said a couple of things, but I don't know exactly why.
Q. Do you recall anything that he said to you?
A. One thing he mentioned was his - he wanted his kids to grow up in South Africa.
Q. Okay. Anything else?
A. He missed South Africa.
Q. Okay. Anything else?
A. Not that I can recall.
Q. Have you spoken with Richard since he left the company?
A. Yes.
Q. And during any of those conversations, he never explained to you why he left Virgin Mobile?
A. No.
Q. Do you know if he was fired?

A. I know he wasn't fired.
Q. So you know he voluntarily left the company?
A. Yes. He was - he was also - he was a contractor. He was on contract. So he decided to leave.
Q. How long was he on contract with Virgin Mobile, do you know?
A. I would be guessing if I - it was - a rough - less than two years.
Q. Okay. Do you know who his employer was then, if he was on contract?
A. Virgin Mobile.
Q. So Virgin Mobile, if I understand correctly, has contract employees and permanent employees?
A. Yeah, that's correct.
Q. And can you briefly tell me the difference between the two, based on your experience as a contractor?
A. You get more money as a contractor and you've got less security, you don't get sick leave or superannuation if you're a contractor. Otherwise, I - yeah, that's all I know.
Q. So if - if somebody could choose, being a contractor is preferable?
A. Each to their own.
Q. Okay. Now, with - going back to these concepts

that you discussed - that you discussed with Host, the three different concepts, you said you remember the first one - that's right? Correct?

A. Yes, that's correct.

Q. But you don't - you don't remember the other two?

A. Not off the top of my head.

Q. But they all, did you say, involved images of people expressing opinions?

A. No.

Q. Just the first one?

A. Yes.

Q. And do you remember when, approximately, this meeting with Host took place?

A. Early January - the first meeting took place early January 2007.

Q. And how many meetings did you have since the January meeting and before the launch of the campaign?

A. Approximately eight meetings, I would say.

Q. And can you generally tell me what the purpose was of those meetings?

A. To start with, we tell them what we wanted them to do, they would come back with a number of routes, a number of concepts. We would narrow down the concept. Once we finalised a concept, we would narrow down the creative components and then finalise the components.

Q. Okay. So they would provide you with concepts and you would, over time, choose the ones you liked and ultimately you picked one of them; is that correct?

A. Yes.

Q. Okay. So Host was working at the instruction of Virgin Mobile?

A. Yes.

MR HAWKINS: Object. Form.

BY MR ZEHL:

Q. Okay. Can you tell me, if you recall, did all three concepts involve the use of a Creative Commons licence?

A. I can't remember what the other two were exactly.

Q. Did the first concept involve the use of this licence?

A. Are you asking me if it ultimately involved the use of it?

Q. Yes.

A. At launch, it --

MR HAWKINS: Mr Cain - Mr Cain, one of the questions he's got is - is what - you're saying at the time - at the time, or later he learned?

A. I'd never heard of it before.
Q. Okay. Do you know if Richard was aware that the campaign involved the use of a Creative Commons licence, from your interactions with him?
A. At what time? Before the launch?
Q. Yes.
A. I don't know.
Q. Okay. During your discussions with Host, when was it presented to you that they would be using amateur photographs - amateur pictures rather than professional pictures?
A. Sorry, could you just repeat the question then?
Q. At what point in time did you learn that the campaign would be using amateur photographs and not professional models?
A. At the - the concept stage, when there were three concepts still.
Q. Okay. So at the early stages of the campaign; is that correct?
A. Yes.
Q. And did you or somebody at Virgin Mobile tell Host that you wanted to use amateur pictures?
A. No.
Q. Did you tell them that you wanted to use professional models?
A. No.
Q. So whose idea was it to use amateur photographs?
A. The - the concept that we went with, part of that concept was using these - the pictures from Flickr.
Q. Okay. That's the concept that you chose and accepted; is that correct?
A. Yes.
Q. And did you personally pick that concept or did you say you picked it in conjunction with Richard?
A. Yes, in conjunction with Rich.
Q. Was - was there anybody else in your department or at Virgin Mobile that assisted you with choosing that concept?
A. To a very small degree, we would have shown a couple of people around the office for their thoughts.
Q. Okay. How did Host present the concepts to you? Did they use images and slogans or did they describe it to you in words? Can you - can you give me an idea of how these concepts were presented for your approval?
A. We'll talk about the concept as the one that we finalised, because I don't know about the other two because I can't remember, but the concept we went ahead with, they - they presented it as a series of

A3 print-outs which were suggested advertisements with a picture and a - a slogan on the top.
Q. Okay. So they presented the images that were ultimately used in the campaign; is that correct?
A. Yes.
Q. And you and Richard and somebody or nobody else at Virgin Mobile looked at those presentations and approved them for use in the campaign; is that correct?
A. Yes.
Q. Okay. Do you know who Alison Chang is?
A. I know of her, yes.
Q. And how do you know of her?
A. I believe she is part of this case, isn't she?
Q. Did you - did you know who she was before this lawsuit was filed?
A. No.
Q. Did you or anyone else at Virgin Mobile make any attempt to contact her before this lawsuit was filed?
A. No.
MR HAWKINS: Object. Form.
BY MR ZEHL:
Q. Do you know if anyone at Virgin Mobile made any attempt to contact her?
A. No, I don't know - sorry, yes, I do know.
Q. Okay.
A. No-one did.
Q. What's your answer - yes - yes, you do know that nobody attempted to contact her or, no, you don't know if anyone attempted to contact her?
A. To the best of my knowledge, I know that nobody tried to contact her.
Q. Okay. Did you or anyone else, to your knowledge, at Virgin Mobile attempt to contact Justin Wong before this lawsuit?
A. I didn't, and I don't believe anybody else did at Virgin Mobile.
Q. When the concept was presented to you, was one of the pictures a picture of Alison Chang?
MR HAWKINS: Object. Form.
THE WITNESS: As it turns out, yes.
BY MR ZEHL:
Q. Okay. And you approved that image for use in the campaign; correct?
A. Yes.
Q. Did you know where those pictures came from?
A. Yes.
Q. And where was that?
A. I believe they came from a - an image-sharing web site called Flickr.
Q. Okay. Have you ever used Flickr before?

A. Me personally?
Q. I'll rephrase. Have you personally ever used Flickr before this lawsuit?
A. No.
Q. Do you - was it your idea to use Flickr to obtain the images?
A. No.
Q. Do you know if it was at - anyone at Virgin Mobile's idea to use Flickr?
A. It wasn't.
Q. Whose idea was it to obtain the pictures from Flickr, do you know?
A. It was part of the - the - the concept, so it was Host's idea.
Q. But didn't you earlier tell me that you presented the general ideas of what you wanted in these campaigns and that they involved pictures of people with opinions - is that right or is that wrong?
MR HAWKINS: I object. Form. Mischaracterises his testimony and argumentative.
THE WITNESS: I didn't say that.
BY MR ZEHL:
Q. Okay. So from the beginning of the - from your first meeting with Host to the launch of the campaign, it's correct to say that concepts were presented to you and you ultimately chose one that used images obtained from Flickr; is that correct?
A. Yes.
Q. Okay. At that time, you had no knowledge that the pictures were being used pursuant to a Creative Commons licence; is that correct?
A. That's correct.
MR HAWKINS: Object. Form.
BY MR ZEHL:
Q. Do you know who downloaded the pictures of the people that were used in the "Are you with us or what?" campaign?
A. I - I know that there were - I know from a - I know - I don't know who - exactly who downloaded each picture, no.
Q. Do you know if the pictures were downloaded by somebody at Virgin Mobile or some - somebody somewhere else?
A. The pictures were downloaded by a company called The Glue Society.
Q. Okay. What is your - what is Virgin Mobile's relationship with The Glue Society?
A. We have no relationship.
Q. Then how did Virgin Mobile end up using pictures that were downloaded by The Glue Society in the

"Are you with us or what?" campaign; do you know?
A. Host had contracted The Glue Society.
Q. Okay. In Mr Bourget's affidavit in support of Virgin Mobile's motion to dismiss he states that Virgin selected the image of Alison Chang from hundreds of millions of available photographs from Flickr; is that correct or incorrect?
A. We didn't select the pictures from Flickr.
Q. So his affidavit is incorrect?
A. I don't think it's --
MR HAWKINS: Object. Form.
THE WITNESS: It's not a hundred per cent clear.
BY MR ZEHL:
Q. Excuse me? What did - can you repeat - you're not 100 per cent clear; is that correct?
A. Marcus's description isn't a hundred per cent clear of exactly what happened.
Q. So is he not qualified to provide his opinions on where the pictures were selected and obtained?
A. I don't know what qualification you need.
Q. Well, for somebody's statement - why - why is the statement not clear, can you tell me?
A. We didn't - we didn't select the pictures from Flickr. We - all we - we chose from a range of advertising - print advertisements that were presented to us.
Q. Do you know how many Flickr images were presented to you in the first concept?
A. All-up, 40. Roughly 40.
Q. And were all 40 of those images used in the campaign?
A. No.
Q. So you selected from the Flickr images that were presented to you; is that correct?
MR HAWKINS: Object. Form. Mischaracterising the evidence.
MR ZEHL: No, that's exactly what he said.
MR HAWKINS: No, again, the image - it's all one page. The images are on one page. There's no separate image.
BY MR ZEHL:
Q. Okay. Can you describe to me how the Flickr images were presented to you?
A. As a series of advertisements with a slogan and a picture and a logo.
Q. Okay. Were all those pictures on one page, the 40 images that you said were presented to you, or were they on separate pages? Can you tell me how they were presented to you?
A. Each advertisement was presented on an A3 piece

of paper with a single image, a slogan and a logo at the bottom.

Q. Okay. Okay. I understand. So is it correct to say that there were approximately 40 eight-by-three pages presented to you if there were 40 images?

A. There were 40 advertisements, approximately.

Q. And how many advertisements were ultimately used in the campaign?

A. Between 17 and 20.

Q. How did you choose the 17 or 20 of the 40?

A. Gut feel.

Q. Okay. Was it - was it your decision, was it Richard's decision or did you both decide which of the 40 advertisements would be used in the campaign?

A. We both decided.

Q. Okay.

MR ZEHL: Now, do you guys mind if we take a five-minute break?

THE VIDEOGRAPHER: Going off the record at 11.21am.

(11.21am)

(Break taken)

(11.40am)

THE VIDEOGRAPHER: Going back on the record at 11.40am. Proceed.

BY MR ZEHL:

Q. Okay. Mr Cain, did you consult with either of the attorneys in the room during this break about the case?

A. Yes.

Q. Okay. What did you talk about?

MR HAWKINS: Don't answer that question. That was some levity by our friend here.

BY MR ZEHL:

Q. Mr Cain, did Virgin contract with Host to assist them with this campaign?

A. We don't have a contract with Host, no.

Q. Have you ever had a contract with Host?

A. No.

Q. So who determines how much you're paying Host and any of the details relating to the projects that they do for you? Are those decided in oral conversations?

A. We have a - a day rate that we pay members of Host, and that's in a - a schedule of fees, and then for a project like this, a campaign, they would present an estimate of how much they thought it would cost.

Q. Okay. And did that estimate include how many hours they anticipated working on it, or was it just based on a project-by-project basis, do you know?

A. The estimates are everything excluding the account management team head hours, so there is a number of people that work on the business ongoing every month, and then when a - a campaign like this comes up, or any campaign, more people might be brought in and there might be other resources that are required and a project estimate would be put - would be - would be presented to us to cover the - those additional costs.

Q. Okay. Do you know how much Virgin paid Host for the "Are you with us or what campaign?"?

A. I would be guessing if I said.

Q. Do you know if it was more than a thousand dollars?

A. Yes, I do know.

Q. Was it more than a thousand dollars?

A. Yes.

Q. So why don't you guess for me what they paid, if you know that it was over a thousand dollars?

A. Okay. I will guess that the project fee would be in the vicinity of $150,000, and we would have paid them approximately 30,000 a month in head hours - that's how much we roughly pay them each month, so --

Q. Is that every month, regardless of whether they're working on a campaign for you, or is it only during the months that they work on the campaign for you that you pay them that 30,000?

A. They do other work that's not campaign based, so - it - it fluctuates between 15 and 60, but average per year is roughly 30 a month.

Q. So would you say that Virgin pays Host every month?

A. We would pay them an amount of money every month, yeah, based on work they would do.

Q. What other work do they do besides campaign work?

A. They run, like --

Q. What other type of work do they do?

A. They facilitate workshops about brand positioning, they undertake research for us, market research, a number of - a number of, yeah, duties similar to that.

Q. Have you worked with Host since the "Are you with us or what?" campaign?

A. Yes.

Q. Okay. Did Host assist you in launching the broadband campaign?

A. Yes.

Q. Okay. What - what does Host do generally when they're helping you with campaigns? What services do they provide to Virgin Mobile?

A. Advertising strategy and creative.

Q. And what do you do in your role as the brand marketing manager? How is that different than what Host provides to you?

A. I generally brief guidelines for them to come back with strategy and creative.

Q. So you create the guidelines and then they come back with the strategy and the creative?

A. Yeah, I normally - the guidelines - I - yes.

Q. Okay. And then you're ultimately responsible for selecting the campaigns that Virgin Mobile is going to use to promote its products; is that correct?

A. Ultimately, yeah, I'll approve advertising concepts.

Q. Okay. Did you have any communications with anyone at The Glue Society during the "Are you with us or what?" campaign?

A. They were present at meetings, yes.

Q. Were they first present at the initial meeting with Host?

A. Not at the first briefing meeting, no.

Q. Do you know when they started to appear at the meetings?

A. The first meeting they attended was when they presented three concepts.

Q. Okay. And - and was that - did you say that was approximately in January of 2007?

A. That would have been more like getting towards the end of February.

Q. Okay. Did Host get your permission before bringing Glue Society into the project?

A. Yes.

Q. Did you request that Glue Society assist with the project or did anyone else at Virgin Mobile request that Glue Society assist with the project?

A. No.

Q. Have you ever worked with The Glue Society before the "Are you with us or what?" campaign?

A. Yes.

Q. And was it always in conjunction with working with Host?

A. Yes.

Q. Have you or anyone else at Virgin Mobile, to your knowledge, ever personally requested or requested as a corporation that Glue Society assist with a project?

A. Sorry, can you repeat the question?

Q. Has - has Virgin Mobile ever requested that Virgin Mobile [sic] assist with a project in the past, to your knowledge?

A. I can't speak for all of Virgin Mobile.

Q. Anyone in your group, the brand marketing group, to your knowledge?

A. I can't think of an example, but I would say the - there is a chance that yes.
Q. Okay. Are you aware of any contracts or - contracts between Virgin Mobile and any companies that are based in the United States?
A. No.
Q. Do you know if Host has any locations in the United States?
A. I don't know.
Q. Do you know if The Glue Society has any locations in the United States?
A. Yes, I do know.
Q. Do they?
A. Yes.
Q. Okay. Did Virgin Mobile pay The Glue Society for the work that they performed on the project?
A. No.
Q. Did - do you know if Host paid The Glue Society?
A. I assume so, yes.
Q. Okay. Are you aware that the "Are you with us?" campaign won several awards?
A. No. I --
Q. Did the "Are" - did it win any - did the campaign win any advertising awards, to your knowledge?

A. I don't think so, no.
Q. Okay. Do you know - do you know Richard's full name, the former director of the marketing group?
A. The brand general manager? Yeah, Rich Field.
Q. Yes. Do you know his middle name?
A. No. Gerard? No. Don't know. It might start with a "G".
Q. Okay. But you don't know?
A. No.
Q. Do you know if he was from Queenstown?
A. No, he was from South Africa.
Q. Okay. And is he living in South Africa now?
A. Yes.
Q. Okay. Do you know if Richard had a - Rich had a Flickr account?
A. I don't know.
Q. Okay. I'd like to introduce as plaintiff's exhibit number 1 - you may have already marked it, and, if so, then that's fine, this email and print-out from the Flickr web site.
(Exhibit 1 marked for identification)
BY MR ZEHL:
Q. Mr Cain, if you wouldn't mind turning to the second page, I believe at the top it says, "Virgin Mobile - Are you with us or what? / Discuss".

what you're saying?
MR HAWKINS: Object. Form.
THE WITNESS: Yeah, specific - are you saying - yeah, so repeat the question, please? What --
BY MR ZEHL:
Q. From what you're telling me --
A. Mmm-hmm.
Q. Okay. Are you suggesting that Virgin Mobile launched - launched the campaign first and then made sure that it was acting within the terms of the Creative Commons licence, as this - as this email or posting says?
A. No. We would have --
MR HAWKINS: Object. Form.
THE WITNESS: Yeah. No, that's not what I'm saying. We would have had approval to use --
BY MR ZEHL:
Q. So do you - go ahead.
A. We would have asked Host if we were - if we had approval to use the images.
Q. So did you ask Host if you had approval to use the images?
A. Before - before every campaign, before we give the final stamp, we will ensure that we have the rights to use the - any - any material that's in there.

Q. Okay. And did you do that before the "Are you with us or what?" campaign?
A. I didn't do it. It was done.
Q. Did somebody at Virgin Mobile do it in your group?
A. Someone in the brand team would have asked, "Do we have the rights to use the components of these advertising - of these advertisements?".
MR BOURGET: I think we've lost them.
MR ZEHL: Okay. I'm sorry, we lost you. The last that I head was "somebody in the brand team", and then I lost connection.
A. Somebody in the brand team would have asked Host, "Do we have the rights to use the materials in the advertisements?".
Q. Okay. Do you know who that person was in connection with the "Are you with us or what?" campaign?
A. I'm reasonably certain it was Rich.
Q. Okay. So you're reasonably certain that Rich made sure that you had the rights to use the image; is that correct?
MR HAWKINS: Object. Form. You're mischaracterising what he has said.
BY MR ZEHL:
Q. Tell me what you're reasonably certain of, if

you wouldn't mind, please?

A. I'm reasonably certain that Rich said, "Can we - do we have the rights to use these images - these - these - the images, the - the - the - the font." Yeah, any component of the advertisement, he would have said - asked if we were - if we were - had the rights to use it.

Q. And do you think that at that time the Creative Commons licence would have been mentioned to Richard by Host, based on your workings with Host and your past relationships with then?

MR HAWKINS: Object. Form.

THE WITNESS: Yes, I believe that they would have said, yes, that you do have the rights to use the images.

BY MR ZEHL:

Q. Based on the Creative Commons licence?

MR HAWKINS: Object. Form.

THE WITNESS: I can assume that they - they would have said, "Under the Creative Commons licence, you have the rights to use those pictures."

BY MR ZEHL:

Q. Okay. So if that is correct, your assumption, then somebody at Virgin Mobile knew before the campaign that they were using the Creative Commons licence; is that right?

MR HAWKINS: Object. Form.

THE WITNESS: That's - I assume.

BY MR ZEHL:

Q. Okay. On what other basis would they have told you that you had the rights to use the pictures? I mean, what rights are they referring to? I'm assuming you're familiar with the rights relating to pictures, based on your role in the company - are you or are you not?

A. I'm aware, yes.

Q. Okay. So can you describe to me some of the rights that relate to pictures as used in advertising campaigns, based on what you know?

A. If we'd taken the pictures ourselves, we would have got approval from the photographer.

Q. Okay. Would you have - do you need to get - would you have gotten approval from anybody else, or is it just the photographer, if you had taken the pictures yourself?

A. If there was a particular model that we'd paid to use, we would have got a model release as well from them.

Q. If you had not paid the person, would you get their permission to use their image?

A. I've never - I've never used somebody else's picture before. I've always taken them myself.

Q. Did - did Virgin Mobile use the picture of

DEPONENT'S DECLARATION

I, , hereby declare under penalty of perjury under the laws of the United States and the State of Texas that I have read the foregoing transcript and identify it as my own and approve same as a true and correct transcript save and except for changes and/or corrections, if any, as indicated by me on the CORRECTIONS page hereof.

, , ,
Date City State

Signed:

REPORTER'S CERTIFICATE

I, Judith White, of National Court Reporters, Inc. do hereby certify that the foregoing testimony was recorded by me stenographically and thereafter transcribed by me, and that the foregoing transcript constitutes a full, true and accurate record of said examination of and testimony given by said witness, and of all other proceedings had during the taking of said deposition, and of the whole thereof, to the best of my ability.

I further certify that I am not a relative, employee or counsel of any of the parties of the within cause, nor am I an employee or relative of any counsel for the parties, nor am I in any way interested in the outcome of the within cause.

Signed ______________________ Dated ________
(Judith White)